IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX REFERENCE NO.303 OF 1987

Commissioner of Income-tax,)
Bombay City-III, Bombay.)..APPLICANT

Versus

M/s.Heritage Estate Private Ltd.)
C/o. Kalyaniwalla and Mistry,)
Chartered Accountants, Manekji)
Wadia Building, 127, M.G.Road,)
Bombay-23.)..RESPONDENT

Mr. Ashok Kotangale for the Applicants
Mr.J.D. Mistry i/b. Poddar & Co., for the Respondent.

CORAM: F.I. REBELLO & J.P. DEVADHAR, JJ.
DATE : 18TH OCTOBER, 2007

ORAL JUDGMENT: (PER F.I. REBELLO, J.).

. The Tribunal at the instance of the assessee has been pleased to refer the following question in respect of Assessment Year 1979-80:-

> "Whether on facts and circumstances of the case, assessment for assessment year 1979-80 was time barred?."

. Similarly, at the instance of Revenue the question as referred is as under:-

> "Whether on facts and circumstances of the case, Rs.82,91,400/- were assessable as income from business or as capital gains?

. We shall first answer the question as referred on

behalf of the assessee. If we answer the question as referred on behalf of the assessee in the affirmative then the question as referred to on behalf of the Revenue is not required to be answered.

2. The submission as canvased on behalf of the assessee is that under Section 153(1)(a)(iii) of the Income-tax Act no order of assessment shall be made under Section 143 or Section 144 at any time after two years from the end of the assessment year in which the income was first assessable, when such assessment order is an assessment year commencing on or after 1st April, 1969. This is subject to what is set out in Section 144A and 144B of the Act.

. Under Section 144-B where, in an assessment to be made under sub-section (3) of Section 143, the Income-tax Officer proposes to make any variation in the income or loss returned which is fixed by the Board under sub-section (6), the Income-tax Officer shall in the first instance, forward a draft of the proposed order of assessment to the assessee. A procedure is then prescribed as to how the matter has to be then proceeded with. On the draft order being served the assessee must forward his objections if any within the time stipulated in sub-section (3), to the Inspecting Assistant Commissioner. The .Inspecting Assistant Commissioner shall after going through (wherever necessary) the record relating to the draft order, issue, in respect of the matters covered by the objections, such directions as he thinks fit for the guidance of the Income-tax Officer to enable him to complete

the assessment. At this stage we may note Explanation 1 clause (iv) of Section 153 of the Act which reads as under:-

> Explanation 1: In computing the period of limitation for the purposes of this section----
>
> (i).....
> (ii).....
> (iii).....
>
> (iv) the period (not exceeding one hundred and eighty days) commencing from the date on which the Income-tax Officer forwards the draft order under sub-section (1) of section 144B to the assessee and ending with the date on which the Income-tax Officer receives the directions from the Inspecting Assistant Commissioner under sub-section (4) of that section, or, in a case where no objections to the draft order are received from the assessee, a period of thirty days
>
> (v).....
>
> shall be excluded.

3. It is the contention of the assessee that the A.O. forwarded the draft order on 24th March, 1982. The A.O. received the direction from I.A.C. on 25th September, 1982 and the order was passed on 27th September, 1982. After

excluding the 180 days as contemplated by Explanation 1 of sub-section (4) of Section 153, the assessment order had to be made by 26th September, 1982, but the order was passed on 27th September, 1982 and consequently is barred by limitation.

. On the other hand on behalf of the Revenue the learned Counsel contends that the order has been passed within limitation and consequently is not barred.

4. The limited issue, therefore, is whether the limitation expired on 26th September, 1982 or 27th September, 1982. If it expired on 27th September, 1982 it would be within limitation and the contention urged on behalf of the assessee will have to be rejected.

5. In answering the issue we will have to refer to Section 9 of the General Clauses Act, 1897. Section 9 reads as under:-

> "9. Commencement and termination of time.-- (1) In any Central Act or Regulation made after the commencement of this Act, it shall be sufficient, for the purpose of excluding the first in a series of days or any other period of time, to use the word "from", and, for the purpose of including the last in a series of days or any other period of time, to use the word "to".

(2) This section applies also to all Central Acts made after the third day of January, 1868, and to all Regulations made on or after the fourteenth day of January, 1887."

. It is an admitted position that the normal period of limitation under Section 153(1)(c)(iii) was 31st March, 1982. The A.O. forwarded the draft order on 24th March, 1982 and the A.O. received the direction of I.A.C. on 25th September, 1982 That would be 185 days. Considering the language of Explanation 1 (iv) which uses the expression "commencing from the date". When the Act is a Central enactment and has, used the expression "commencing from" and considering Section 9 of the General Clauses Act, once the word "from" is used, the first in the series of days or any other period of time has to be excluded. From the chart produced by the assessee for the month of March, 8 days have been counted including 24th March. In terms of the Section 9 of the General Clauses Act if the first day is excluded then the number of days remaining in March would be 7 and not 8 as calculated on behalf of the assessee. Thus the time taken between the A.O. forwarding the draft order and the A.O. receiving the directions from the I.A.C. on 25th September, 1982 would be 185 days and not 186 days as calculated by the assessee. If it is so considered then the last day would be 27th September, 1982. In our opinion, therefore, the question as referred to on behalf of the assessee will have to be answered against the assessee and in favour of the Revenue.

6. We may now consider the question as referred at the instance of the Revenue. On 1st November, 1975 an Agreement came to be entered into between Byramjeebhoy Pvt. Ltd., hereinafter referred to as the Parent Company and Heritage Estates Pvt. Ltd. hereinafter referred to as the Subsidiary Company to take over the moveable properties and the liabilities specified in the Schedule to the Agreement. The consideration for the transfer was by payment of Rs.25,94.881/- which was to be paid in the following manner:-

> Rs.1.00 lac by allotment to the Parent Company 1,000/- fully paid up equity shares in the capital of the Subsidiary Company of the face value of Rs.10/- each.
>
> The balance consideration of Rs.24,94,881/- was to be treated as loan and to be paid by the Subsidiary Company to the Parent Company on or before 30th September, 1985.

The properties listed in the Schedule included cars, investments by way of equity and debentures as also bonds and various lands and other items. The Authorised Capital of the Subsidiary Company was Rs.5.00 lacs divided into 5000 shares of Rs.100/- each and at the relevant time, two shares fully paid up shares had been issued and were in the beneficial ownership of the Parent Company.

. The Parent Company had entered into an Agreement dated 24th May, 1961 with New Swastik Land Development Corporation for sale of about 700 acres of land. The Parent Company had filed a suit against New Swastik Land Development Corporation and a consent decree was passed for recovery for the purchase consideration in October, 1969. The Government of Maharashtra under Notification published in the year 1960 sought to acquire a part of the land which was agreed to be sold to New Swastik Land Development Corporation of Survey No.741 of village Oshiwara admeasuring 181 acres. An Award was passed in June, 1971. Subsequent to the Award the Parent Company conveyed the land under the Agreement less the land acquired by the Government for a consideration of Rs.18,92.306/- as agreed to by both the parties as per Agreement dated 29th July, 1970. The Government for the land acquired settled the compensation at Rs.99,16,000/-. Out of this compensation in terms of the order passed by this Court in Suit No.660 of 1968, a sum of Rs.32,70,000/- was paid to New Swastik Land Development Corporation. The name of New Swastik Land Development Corporation had been changed to M/s.Oshiwara Land Development Corporation Private Limited. The Bombay Municipal Corporation had also acquired some land and in respect which the compensation was also paid. The amounts which are the subject matter of the notice are the amounts received as compensation from proceedings in land acquisition or from transfer of land.

7. The Assessing Officer relied on the Memorandum and Articles of Association and set out that as per Clause 3 of the main objects for which the Company is incorporated one of the objects is to acquire by purchase, lease, exchange deal in or otherwise, lands and properties of any tenure or any interest in lands and properties in the State of Maharashtra and elsewhere. In the light of that the Assessing Officer proposed to tax the amount as set out as business income for the assessment years 1979-80 and assessee was called upon to file objections. The assessee took various objections. It was their contention that the assessee is an investment company and they have taken over investment to earn income thereon which would be liable to be taxed as business income. It is this capital asset which is used in business. Hence the income received is not business income, but capital received. Various other objections were also raised. After considering the various contentions the Assessing Officer was pleased to hold that the amounts received by way of transactions earlier referred to less cost based on Mercantile basis or cash basis is clearly a business profit. It was held that what has been transferred to the assessee company on 1st November, 1975 is not the land, but the right to compensation from the Maharashtra Government and the right to receive sale proceeds from M/s.Swastik Land Development Corporation. The Income Tax Officer proceeded to hold that the assessment of income arising on sale of the property has been rightly assessed as income from business.

. The Assessee aggrieved preferred an Appeal before the Commissioner of Income Tax. The Commissioner of Income Tax by order dated 30th August, 1983, in respect of the receipts from the compensation from the land acquisition and sale of property held that they were in the nature of business income and they were rightly taxed.

8. The assessee aggrieved preferred an Appeal before the Income Tax Appellate Tribunal. The Income Tax Tribunal in respect of this ground observed in para.10 of its order that the main reason for taxing this surplus as business income was the finding of the Income-tax Officer that the transaction by the assessee was clearly in the nature of business. The learned Tribunal noted the argument that the estate was originally held by the family of Sir Byramjee Jeejeebhoy Bart. Later on for proper administration of the estate, the entire property was transferred to M/s.Byramjee Jeejeebhoy Private Limited. Due to compelling domestic circumstances the present assessee company was incorporated with a view to take over and administer a part of the estate efficiently which belonged to one branch of the family. Neither the parent company nor the assessee had at any time indulged in any business activity either in the past or even during the accounting period. Reference was made to the acquisition by the State of Maharashtra and B.M.C. The Tribunal noted that the assessee company had not engaged in business and for the assessment years 1976-77, 1977-78 and 1978-79 had been treated as investment company by describing as such. In respect of assessment year 1976-77 which had

come up in I.T.A. No.1352(Bom).1980 decided on 14th March, 1981 where the question was regarding the ascertainment of the capital gains on the transfer of certain land, the Departmental authorities had not treated the transaction for that assessment year as a business venture, but it was treated as a capital transaction resulting in a capital gain. This was the material before the Tribunal.

. The Tribunal posed to itself a question as to whether these a amount represented assessee's income from any business?

. Relying on various judgments it noted that underlying the expression "business" is the fundamental idea of continuous exercise of an activity. In trade as well as in business there is a continuity of operation. The activities organised on normally accepted commercial lines constitute the essence of any business. Relying on the ratio of the judgment of the Privy Council, the Supreme Court and the various High Courts which were referred to, judgment the Tribunal noted that in order to say that the assessee carried on a business, there has to be some continuous activity on the part of the assessee. Noting that the assessee came into existence on 11th June, 1975, it arrived at a conclusion that dealing with the lands under consideration could be called as business. In so far as the incident of profit from the three sources, the Tribunal recorded a finding that the receipts are in the nature of capital gains and the matter restored to the Income Tax

Officer for ascertaining the capital gains under the had "capital gains".

9. In our opinion the question is whether it can be said that the finding recorded by the Tribunal was incapable of being arrived at. As we have noted earlier the Tribunal addressed itself to the tests laid down by various judgments as to what actually can be said to be a business activity. We may now refer to the various judgments relied on by learned Counsel. In Commissioner of Income Tax, Nagpur vs. Sutlej Cotton Mills Supply Agency Ltd., 100 ITR 706, the assessee company had purchased shares and had sold them on different dates for a profit. The question for consideration was whether the profit arising out of the sale is assessable as business profit. The Supreme Court noted the principles underlying the distinction between a capital sale and an adventure in the nature of trade. Reference was made to the judgment in G.Venkataswami Naidu & Co. vs. Commissioner of Income Tax, where the Supreme Court had held that the character of a transaction cannot be determined solely on the application of any abstract rule, principle or test but must depend upon all the facts and circumstances of the case. It is ultimately a matter of impression with the Court whether a particular transaction is in the nature of trade or business. It noted that a single plunge may be enough provided it is shown to the satisfaction of the court that the plunge is made in the waters of the trade. But mere purchase/sale of shares if that is all that is involved in the plunge may fall short of anything in the nature of

trade. Whether it is in the nature of trade will depend on the facts and circumstances. The Court noted that the question to be asked and answered is what was the dominant intention of the assessee when it purchased the share. If the dominant intention was to carry on an adventure in the nature of business, the profit can be taxed, otherwise not. Considering that the Tribunal had found that the dominant intention of the assessee was to make profit by resale of the shares and not making investment, the order of the High Court interfering with the Judgment of the Tribunal was set aside and the order of the Tribunal was restored.

9. We may advert to some other judgments which would have bearing on the issue before us as to whether the activity carried on by the assesee was adventure in the nature of trade. In Janki Ram Bahadur Ram vs. Commissioner of Income-tax, Calcutta (1995) 57 ITR 21 the Court was considering the case where the Appellant, a dealer in iron scrap and hardware, agreed to purchase all the rights of a company in a jute pressing factory installed on a piece of land. The appellant did not carry on business in jute at any time before the purchase of the jute press and apart from effecting certain repairs and putting the factory in working condition the appellant did not attempt to work the factory. The warehouse or warehouses on the plot were demolished by the appellant. The land and the factory were for a profit. The Court noted that it is for the revenue to establish that the profit earned in the transaction is within the taxing provision. The Court held that if a

transaction is related to the business which is normally carried on by the assessee, though not directly part of it, an intention to launch upon an adventure in the nature of trade may readily be inferred. Similarly where a property is purchased and subdivided, altered, treated or repurchased and sold or is converted into a different consideration and sold. The purchase of land cannot be assumed without more to be a venture in the nature of trade. The profit motive in entering a transaction is not decisive, for an accretion of capital does not become taxable income merely because an asset was acquired in the expectation that it may be sold at a profit.

11. In Commissioner of Income-tax, Madras vs. P.K.N. Co. Ltd., (1966) 60 ITR 65 was a case where the company in its Memorandum of Association inter alia, included the objects to purchase or acquire and to sell, turn to account, dispose of and deal with property and rights of any kind and to sell, manage, develop or dispose of or otherwise deal with any part of the properties, rights and privileges of the company. The assets of the firm were transferred to the company and in consideration the partners of the firm were allotted shares. The company was carrying on plantation business. The plantations were not a compact block and being unable to administer the far-flung estates effectively and economically, the company sold certain small plots of land. Thereafter it sold some other further plots. The question was whether the profits realised by the Company during the relevant assessment year 1951-52 in the sale of

plots were brought to tax. Considering the facts the Court noted that the primary object of the company was to take over the assets of the firm, to carry on the business of planters and to earn profits by the sale of rubber. The acquisition of the estates was not for the purposes of carrying on business in real estate. The incidental sale of uneconomical or inconvenient plots of land could not convert what was essentially an investment into a business transaction in real estate. The Court then observed "Existence of power in the memorandum of association to sell or turn into account, dispose of or deal with the properties and rights of all kinds had no decisive bearing on the question whether the profits arising therefrom are capital accretion or revenue income". The profits arising from the sale of the properties were not taxable income. The Court then noted that the question whether in purchasing and selling land the tax-payer enters upon a business activity has to be determined in the light of the facts and circumstances. The purpose or the object for which it is incorporated where the tax-payer is a company may have some bearing, but is not decisive, nor is the circumstance that a single plot of land was acquired and was thereafter sold as a whole or in plots decisive. Profit motive in entering into a transaction is also not decisive.

12. Considering these tests, is it possible to contend that the assessee was carrying on an adventure in nature of trade or business. The facts on record indicate that the assessee did not carry on any business and for several

assessment years the I.T.O. had treated the assessee company as an investment company. The Assessee Company had only received compensation from the Agreements earlier entered into by the Parent Company and/or from land which was acquired by the company. The I.T.O. had relied upon the number of articles to arrive at a conclusion that sale of land was one of the activities. Considering the judgment in P.K.N. Co. Ltd., that cannot be a decisive test. Considering the other tests which had to be satisfied before arriving at a conclusion the Company had carried on an activity in the nature of trade. In our opinion it cannot be said that the view taken by the assessee company is perverse. At any rate the revenue has been unable to show that the activities carried on by the assessee were in the nature of trade. The income received is either by acquisition of land or from sale of land during the period the parent company was the owner. The assessee would receive the compensation on the property being allotted to it.

12. In the light of our discussion the references made at the instance of the Revenue have to be answered against the Revenue and in favour of the assessee.

. References disposed of accordingly.

(J.P. DEVADHAR, J.) **(F.I.REBELLO,J.)**